

BEFORE THE DEPARTMENT OF AGRICULTURE  
OF THE STATE OF MONTANA

In the matter of the proposed )	NOTICE OF PROPOSED
adoption of new rules I )	ADOPTION
through X relating to )	
alternative dispute )	NO PUBLIC HEARING
resolutions of seed contract )	CONTEMPLATED
disputes )	

TO: All Concerned Persons

1. On August 21, 2004, the Montana Department of Agriculture proposes to adopt new rules I through X relating to alternative dispute resolutions of seed contract disputes.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on August 5, 2004 to advise us of the nature of the accommodation that you need. Please contact Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The definitions in this subchapter apply to 80-5-501 through 80-5-510, MCA:

- (1) "Alternative dispute resolution" (ADR) means a process by which the parties agree to submit their differences to the judgment of an impartial council.
- (2) "Buyer" means a person who buys agricultural seed.
- (3) "Council" means the alternative dispute resolution council established in 80-5-504, MCA.
- (4) "Seller" means a person selling agricultural seed.

AUTH: 80-5-509, MCA  
IMP: 80-5-509, MCA

REASON: The statute does not define these terms used in the alternative dispute resolution process.

NEW RULE II BUYER FORMS FOR ALTERNATIVE DISPUTE RESOLUTION (1) The buyer's sworn complaint must be on forms provided by the department or in a format containing the following information:

- (a) name and address of person or company filing for alternative dispute resolution;

- (i) permission to enter owned or leased property for purposes of conducting an investigation of the sworn complaint;
- (b) seller name and address where seed was purchased;
- (c) crop kind, crop variety and, if applicable, brand name;
- (d) lot number and amount of seed purchased, purity and germination information;
- (e) amount of carryover seed available for sampling purposes;
- (f) description of complaint, including alleged damages and dollar loss estimates;
- (g) crop production information may include, but is not limited to:
  - (i) legal description of field;
  - (ii) acres affected;
  - (iii) planting date, seeding rate, and seeding depth;
  - (iv) previous three years field crop history; and
  - (v) directions to or location of field;
  - (h) filing date;
  - (i) signature; and
  - (j) notary's acknowledgment.
- (2) The filing fee of \$250 must accompany the copy sent to the department, and is non-refundable upon receipt of an answer from the seller as required in 80-5-506(2), MCA.
- (3) The department may request additional information.

AUTH: 80-5-509, MCA

IMP: 80-5-506, MCA

REASON: This rule provides a list of items important and necessary for the council to investigate a claim by a damaged party. This format of information will allow for each request to be similar in appearance and content, allowing for easier and timely interpretation of claim information.

Both parties involved in the Alternative Dispute Resolution (ADR) process will initially pay a \$250 filing fee. The filing fee will be deposited in the seed account established by 80-5-132, MCA for the purpose of funding costs of the investigation and ADR. If the costs exceed the original filing fees, the council can assess the additional costs to the non-prevailing party or equally distribute them between the parties to the extent that the parties have agreed in writing to the equal distribution. An ADR and investigation may involve, but is not limited to, the following cost estimates: Seed Lab Analysis for purity and germination \$44, Electrophoresis testing to determine variety of a questioned seed \$100, Trait Testing \$15 per trait using Enzyme-Linked ImmunoSorbent Assay (ELISA) methods, review of submitted documentation, examination of buyer and seller, field inspection of growing crop and sampling of remaining seed \$300 (15 hours @ \$20 per hour), Laboratory grow-out test of seed \$400, two meetings of council members including lodging, per

diem and mileage costs \$1,160. Department of Agriculture administrative costs of mailing the statutorily required notices to the buyer and seller, establishing documentation files and copies, costs of informal hearing rooms, and other procedural costs are established to account for 20% of the fixed or known costs being approximately \$403. The total expected cost of an ADR and investigation and conclusion would be \$2,422. The additional cost of investigation, above the filing fees, in this scenario is \$1,922. This money would be reimbursed to the department's seed account for a zero cost impact to the department.

The total economic impact to the non-prevailing party would be \$2,172. The economic impact to the prevailing party would be the original filing fee of \$250. Should the parties agree to an equal distribution of the incurred costs of investigation, each party would see an economic impact of \$1,211.

This rule will impact a seed producer and a seed dealer who become involved in a dispute. The department does not expect more than three disputes a year.

NEW RULE III SELLER'S RESPONSE TO BUYER AND DEPARTMENT

(1) The seller's response filed with the department shall contain, but is not limited to the following:

- (a) seller name and address;
- (b) grower name filing for alternative dispute resolution;
- (c) date seller was first notified of request for alternative dispute resolution;
- (d) responses made to the complaint, whether they agree or disagree and why;
- (e) seed lot identification including:
  - (i) name of seed labeler;
  - (ii) lot number;
  - (iii) certification number;
  - (iv) seed kind;
  - (v) seed variety;
  - (vi) seed treatment, (if treated);
  - (vii) any tests conducted on the lot in question (purity, germination, barley streak mosaic virus, other); and
  - (viii) production year of seed lot;
- (f) list of any additional sales of this lot;
- (g) list of any other complaints that may have been received; and
- (h) seller name, date and signature.

(2) The filing fee of \$250 must accompany the copy sent to the department and is non-refundable upon receipt by the department.

(3) The department may request additional information.

(4) If the seller fails to respond within the time given, the council may place the seller in default and advise the buyer of their right to proceed with a civil complaint in state district court.

AUTH: 80-5-509, MCA  
IMP: 80-5-506, MCA

REASON: This rule provides the seller of seed the format and information to reply to a submitted complaint. The information submitted by the seller allows the council to assess whether this is a valid complaint and determine other problems or additional complaints that may occur with the seed lot in question.

The rule is further necessary because it advises the seller of the buyer's right to proceed in the event of the seller's default, and impresses upon the seller the importance of advocacy by both parties in a dispute. The economic impact for this rule is the same as stated in New Rule II.

NEW RULE IV EXPENSES FOR WITNESSES AND TESTING

(1) Upon request to, and approval of the council, the buyer or seller may have witnesses on their behalf. The expenses for witnesses for either side shall be borne entirely by the party producing such witnesses. The costs of grow out tests or other tests that may be required that exceed the amount of the filing fee may be allocated by the council in making the award.

AUTH: 80-5-509, MCA  
IMP: 80-5-508 and 80-5-510, MCA

REASON: Section 80-5-508, MCA allows for the distribution of costs for ADR. Each party involved in ADR may bring witnesses to a hearing for testimony on their behalf. Alternative dispute resolution is a cost effective way to resolve seed performance issues. The party bringing witnesses on their behalf should pay for their costs without the expectation the costs would become subject to the final award to be paid by the non-prevailing party.

NEW RULE V INVESTIGATION PROCEDURES (1) Investigation procedures may include, but are not limited to the following:

- (a) interviewing the buyer of the seed;
- (b) interviewing the seller of the seed;
- (c) obtaining sample(s) of any remaining seed for grow out tests;
- (d) obtaining copies of records of fertilizer or pesticide that were applied to the field;
- (e) observing the field conditions in question and obtaining:
  - (i) pictures of plants growing;
  - (ii) stand counts of plants;
  - (iii) soil samples for analysis of fertilizer and pesticide residue; and
  - (iv) maps of the field showing patterns or findings observed;

(f) contacting weather service to obtain weather information during the growing season;

(g) contacting university, extension, or industry personnel with expertise on crop type in question; and

(h) observing other documentation as deemed necessary by council members.

(2) Investigations made by the council should be organized and under the direction of a lead investigator with the greatest knowledge of the cropping system and crop type involved in the complaint. This lead investigator may be chosen from the council membership.

(3) If the council determines none of its members possess the knowledge or expertise to conduct a thorough investigation, nothing in these rules shall preclude the council from appointing an investigator from outside its membership to conduct the investigation.

AUTH: 80-5-509, MCA

IMP: 80-5-504 and 80-5-506, MCA

REASON: Knowledge of farming practices, cropping systems and investigational procedures are essential to determining whether a seed failed to perform as stated on the label. A complete investigation will also allow for an equitable settlement between the parties involved. Experts such as Certified Crop Advisors (CCAs) may be appointed to conduct the investigation for the council. CCAs are trained in making recommendations for various farming practices. They are knowledgeable in fertilizer requirements, soil conditions, herbicide application, and water usage for crops.

NEW RULE VI SCHEDULING OF INFORMAL HEARING (1) The presiding officer shall fix the time and place for each informal hearing and shall notify each party in writing of the scheduled informal hearing at least seven days in advance of that date.

(2) The informal hearing will follow the procedures of the Montana Administrative Procedure Act established in 2-4-603 and 2-4-604, MCA.

(3) Such notice shall include:

(a) the names and addresses of the parties to whom notice has been given;

(b) the address and telephone number of the presiding officer of the council;

(c) the names and addresses of the members of the council;

(d) the date, time, place, and subject of the informal hearing; and

(e) a statement of the legal authority under which the informal hearing is being held including the sections of statute and rules involved.

(4) The presiding officer of the council shall attempt to schedule the hearing at a time and place mutually agreeable to the buyer and the seller. Provided that if a mutually

agreeable time and place cannot be found, the presiding officer may set the time and place.

(5) The presiding officer of the council may allow all or a part of the informal hearing to be conducted by telephone, or other electronic means, when the rights of the parties will not be prejudiced and each party has an opportunity to participate.

(6) The parties involved in the informal hearing must declare and receive approval from the council for all persons appearing upon their behalf to provide testimony. A party may not be represented by an attorney unless all parties are represented by an attorney in the informal hearing.

AUTH: 80-5-509, MCA

IMP: 80-5-505, MCA

REASON: This rule allows both parties to provide additional supporting testimony at an informal hearing. Complex issues dealing with seed performance, agronomic practices and environmental issues can become very cumbersome. These issues and questions are not easily portrayed in a written notice and require further explanation in person by the parties involved. The membership of the council may have questions of both parties and this will be most economically handled by a hearing where both parties are present to answer all questions.

NEW RULE VII WAIVER OF INFORMAL HEARING (1) The parties may provide, by written agreement submitted to the presiding officer, that the informal hearing shall be conducted on the pleadings submitted without oral argument or testimony.

(2) The council may make their determination through submitted information and are not compelled to hold an informal hearing.

AUTH: 80-5-509, MCA

IMP: 80-5-509, MCA

REASON: Section 80-5-509, MCA allows for the department to adopt rules for the efficient administration of ADR. Both parties may have enough evidence to present in written documentation for the council to review. If the amount of damages is small enough and the expense to travel to a central location is prohibitive, this rule gives both parties the right to opt out of the informal hearing and have the council determine their case on the submitted documentation.

NEW RULE VIII ALTERNATIVE DISPUTE RESOLUTION COUNCIL REPORT (1) The council shall prepare a written report of its findings within the established time frames. The report shall include:

- (a) findings of fact and conclusions;
- (b) the award; and

- (c) allocations as to costs, if any.
- (2) A simple majority of the council shall be sufficient to make a decision.
- (3) The report shall constitute the final decision of the council.
- (4) Any member disagreeing with an award may prepare a dissenting opinion and that opinion shall be included in the council report.
- (5) Nothing in these rules will prohibit the department from taking enforcement actions based on the findings of the alternative dispute resolution council as prescribed in 80-5-136, MCA, of the Montana Agricultural Seed Act.
- (6) Council findings of "inconclusive due to lack of evidence or cooperation" between parties would be noted in the final report. These findings may result in no award of damages being issued. Costs of the investigation would still be allocated equally.

AUTH: 80-5-509, MCA  
IMP: 80-5-507, MCA

REASON: Section 80-5-507, MCA requires the council to finalize its investigation via a written report to the director. This report must be complete and accurate as it becomes admissible in court should the parties decide to pursue further legal action. Council members with a dissenting opinion may also write a report that will become a part of the findings and court record.

NEW RULE IX AWARD UPON SETTLEMENT (1) If the parties to a dispute settle that dispute during the course of an alternative dispute resolution, the council, at the request of the parties, may set forth the terms of the agreed settlement in the report. A copy of the agreement reached by the parties and a statement requesting withdrawal from alternative dispute resolution must be sent to the council.

AUTH: 80-5-509, MCA  
IMP: 80-5-503, MCA

REASON: This rule provides for the parties to terminate the dispute resolution process, if both parties agree, before the council completes their findings. After initial application for ADR the parties may decide the best way to settle their dispute is better handled between them without the ADR investigation. The business relationship between buyer and seller will often be left intact if they work together to solve the dispute. Settling the case before the council concludes its investigation will also benefit them if it appears the cost of ADR will exceed the initial costs of filing for ADR. The agreement to settle is subject to submission in court the same as the council's complete findings and final report.

NEW RULE X CONFIDENTIALITY (1) Article XII, Section 9, of the 1972 Constitution of the State of Montana provides for the right of all citizens to participate in the deliberations of public agencies, except where "the demand of individual privacy clearly exceeds the merits of public disclosure." If any party to an alternative dispute resolution proceeding requests that confidentiality be observed as to any part, or all of the proceeding, they must make a request to the council in the sworn complaint referenced in [NEW RULE II], or in the response referenced in [NEW RULE III]. The council and the department will balance the privacy interests with the right to participate and advise the parties before proceeding whether the dispute resolution will be kept confidential. In the event the proceeding is determined open, then the complaining, or responding party reserves the right to withdraw the complaint or response, or any part thereof, before any disclosure is made.

AUTH: 80-5-509, MCA  
IMP: 80-5-509, MCA

REASON: This rule is necessary because it tells the affected public of their right to know, their right to privacy and how the department will balance those competing interests when responding to a request to observe proceedings and examine documents.

4. Concerned persons may submit their data, views or arguments concerning this proposed adoption in writing to Gregory H. Ames at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than August 19, 2004.

5. If persons who are directly affected by the proposed adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Gregory H. Ames at the Montana Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. A written request for hearing must be received no later than August 19, 2004.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those



persons directly affected has been determined to be 31 persons based on 311 licensed seed dealers.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding noxious weed seed free forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2944; Fax: (406) 444-5409; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Notice of Proposed Adoption is available through the Department's website at [www.agr.state.mt.us](http://www.agr.state.mt.us), under the Administrative Rules section. The Department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

DEPARTMENT OF AGRICULTURE

(The original of these documents were signed by the Department Director and Department Attorney)

Certified to the Secretary of State, July 12, 2004.